Deauville Hotel *and* Flores Demetrio Gonzales. Case 12-CA-7776

June 15, 1981

DECISION AND ORDER

On January 29, 1981, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed exceptions and a supporting brief and subsequently filed an answering brief to the exception raised by the other party to the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, to modify his remedy,[2] and to adopt his recommended Order.

The Administrative Law Judge found that Gonzales had been illegally discharged in January 1977 and improperly reinstated in May 1977. He also found, however, that Gonzales had been discharged again in May 1978 and, as no new charge had been filed nor had the complaint been amended thereafter, he assumed that the discharge was legal and terminated Gonzales' right to backpay and reinstatement as of the date. The General Counsel excepts to the refusal by the Administrative Law Judge to order reinstatement and backpay after May 1978. We find merit in this exception.

Gonzales was reemployed by Respondent in May 1977 but in a different position from that which he previously occupied, at a substantially lower rate of pay, and at the bottom of the seniority list, which resulted in fewer and less desirable hours. Rather than being assigned to the linen room as he had been before the strike, he was made a houseman. He worked under Augusto Feo, who had been promoted to the head houseman position which Respondent claimed Gonzales had held prior to his January 1977 discharge. When Gonzales complained about his altered status, Respondent threatened to discharge him if his protests continued. In May 1978 Gonzales was discharged again, allegedly for refusing to obey Feo's orders and threatening to kill him. Gonzales conceded that he had argued with Feo but denied making any threats.

We agree with the Administrative Law Judge's finding that Respondent had not satisfied its obligation to reinstate Gonzales following his illegal discharge in January 1977 and it therefore had a continuing obligation to offer him full reinstatement. However, at the hearing, Respondent contended that Gonzales was not entitled to reinstatement because he had been discharged for cause in May 1978 after threatening Feo's life.

The Administrative Law Judge properly received the evidence on that issue because it bore directly on whether Gonzales' continuing right to reinstatement to his former position was forfeited.[3] Nevertheless, after the issue was fully litigated, the Administrative Law Judge failed to resolve the conflict in testimony between Feo and Gonzales or to decide whether the incident warranted Gonzales losing his right to reinstatement. Rather, noting that the General Counsel had not alleged that the May discharge also violated the Act nor had a new charge been filed, the Administrative Law Judge concluded that he must assume the discharge was not unlawful and cut off backpay and reinstatement as of that date. We do not agree.

Inasmuch as Respondent's allegation of misconduct was an affirmative defense to its continuing duty to offer proper reinstatement, the General Counsel did not have to add a new allegation to the complaint and the Administrative Law Judge should have made findings on this issue.

In making his determination, the Administrative Law Judge must balance whatever misconduct he finds against the established unfair labor practices of Respondent in assessing whether Gonzales' conduct was so egregious as to warrant forfeiting of his right to reinstatement and backpay,[4] with any doubts being resolved against the wrongdoer. Accordingly, we will remand this aspect of the case to the Administrative Law Judge for further proceedings. After resolving the credibility conflicts, he must determine whether the circumstances, including Respondent's animus, the lapse of time, and the possible casual connection between Gonzales' illegal demotion and this quarrel with his replacement, warrant a forfeiture of Gonzales' right to reinstatement and backpay after May 1978.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. In view of the crediting of the Charging Party by the Administrative Law Judge, we find the accusation in Respondent's answering brief that the General Counsel had suborned perjury by the Charging Party to be totally unwarranted and uncalled for.

[2] Backpay to the extent already recommended is to be determined in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[3] *Roy L. Burnham, a sole proprietor, d/b/a Bob's Ambulance Service*, 183 NLRB 961 (1970).

[4] Cf. *Seaport Manor, Inc., et al., d/b/a Seaport Manor for Adults*, 248 NLRB 886, 892 (1980); *John Kinkel & Son*, 157 NLRB 744, 746 (1966).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Deauville Hotel, Miami Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order except that the attached notice is substituted for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the above-captioned proceeding be, and it hereby is, remanded to Administrative Law Judge Julius Cohn for the limited purpose of making credibility findings with respect to the May 1978 incidents and recommendations as to whether, under all of the circumstances, the conduct engaged in by Gonzales was such as to require the forfeiture of his right to reinstatement and backpay after May 1978.

IT IS FURTHER ORDERED that the Administrative Law Judge shall prepare and serve on the parties a Supplemental Decision setting forth the resolution of such credibility issues, and findings and conclusions with respect thereto. Copies of such Supplemental Decision shall be served on all the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with discharge should they continue to complain among themselves about their working conditions.

WE WILL NOT discharge or otherwise discriminate against any employee because of that employee's protected activities or union activities.

WE WILL NOT fail to reinstate employees, who are so entitled, to a substantially equivalent position, and further discriminate against them with regard to wages, hours, and working conditions because of the protected activities in which they had engaged.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole Flores Demetrio Gonzales for any losses he may have sustained by reason of the discrimination practiced against him, plus interest.

DEAUVILLE HOTEL

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This proceeding was heard at Coral Gables, Florida, on March 6, 1980. Upon a charge filed on June 28, 1977, the Regional Director for Region 12 issued a complaint on July 26, 1977, alleging that Deauville Hotel, herein called Respondent, violated Section 8(a)(1) and (3) of the Act by discharging Flores Demetrio Gonzalez, the Charging Party herein, on January 18, 1977. The complaint further alleges that Respondent reinstated Gonzalez about May 21, 1977, but unlawfully failed to restore him to a substantially equivalent position and, further, gave him a less desirable job and denied him other benefits to which he was allegedly entitled. The complaint also alleges violation by Respondent of Section 8(a)(1) of the Act by threatening Gonzalez with discharge unless he refrained from complaining about working conditions. Respondent filed an answer denying the commission of unfair labor practices.

All parties were given opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel and Respondent submitted briefs which have been carefully considered. Upon the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Respondent, a Florida corporation, has a principal place of business in Miami Beach, Florida, where it is engaged in the operation of a hotel. In the course of its operations, Respondent annually grosses revenues in excess of $500,000 and purchases goods, supplies, and materials in excess of $50,000 which are shipped to it from places outside the State of Florida. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

During the period relevant herein, Respondent was a member of Southern Florida Hotel and Motel Association. The Association and four of its members, not including Respondent herein, were parties to an extensively litigated case, in which the Union and certain individuals were charging parties, decided by the Board and reported at 245 NLRB 561 (1979). Some of the findings of the Board therein are relevant to the instant case.

The Union had been for a number of years collective-bargaining representative of employees of Association members with a contract which expired on September 16, 1976. After unsuccessful negotiations, a strike commenced in December 1976 and continued until January 14, 1977, when the parties reached agreement on a new contract. For the purposes herein, it is sufficient to state that the agreement provided that all strikers would be returned to work as the need arose starting immediately. The exceptions to this were those strikers whose jobs were eliminated and those employed in departments of hotels which had been closed and would therefore not be recalled until the particular department reopened.

The Board found that Union, after ratification vote, signed the new agreement on Saturday, January 15, 1977, and the Association, after meeting with its members on Monday, January 17, executed the contract at 11 a.m. and delivered it to the Union by messenger.

In the case cited above, the Board found many violations of Section 8(a)(1) and (3) of the Act relating to employees discharged by the respondents therein after the termination of the strike, of whom some were unlawfully discharged for picketing on January 17, 1977.[1]

B. *The Facts*

Gonzalez had been employed by Respondent since 1965 and worked in the housekeeping department since 1971, when he was assigned to the linen room. According to Gonzalez, after a number of months the then housekeeper designated him as a head linen man and gave him a higher rate of pay. The housekeeper in 1977, Mathew Ginsberg, referred to Gonzalez as the head houseman. The title, if such did exist, makes no difference with regard to the outcome of this matter. At the time of the strike, Gonzalez was earning $186.20 per week for 6 days work and did not receive overtime. There is no dispute that Gonzalez worked in the linen room where there would normally be two other employees. His duties consisted of sorting, counting, and setting up linen on carts so that the housemen could distribute it to the rooms. In addition Gonzalez had one other duty which was his alone. He drove a truck to an outside laundry to pick up clean linen as needed. There is some difference in the testimony as to frequency with which Gonzalez performed this chore. Respondent's witnesses stated that this was a daily routine performed by Gonzalez as often as twice a day. Assuming the correctness of Respondent's version, it remains clear that the major portion of his time was spent in his duties in the linen room.[2]

Gonzalez had been a longtime union member who joined the picket line when the strike started at Respondent on December 26, until January 14, 1977, when picketing stopped. On January 17, he reported back to work, punched his clock and was called by Mathew Ginsberg, then the executive housekeeper, who told him he would be working 4 days a week. That day he worked in the linen room as he usually did. He noticed three other employees in the linen room at the time, two women and one man, whom he had not seen prior to the strike. That afternoon, about 1 p.m., Gonzalez went outside to obtain a pack of cigarettes for Ginsberg and noticed 15 or 20 of Respondent's employees picketing. He went back to the hotel and resumed work until the shop steward came by and told him the contract had not as yet been signed and that the employees had to walk out again. Gonzalez then walked out and commenced picketing with the others. Gonzalez also testified that he had spoken to the pickets previously while out on his errand and had been told that the contract had not been signed, Respondent was not recognizing seniority, and a few of the employees were fired. After a couple of hours he noticed the banquet manager speaking to the steward who then told the employees to stop picketing. Since this was approximately 3:30 p.m., which was the normal end of his workday, and other employees were leaving the hotel, Gonzalez went home.

The following morning, January 18, upon his arrival Gonzalez was not permitted to punch in. He was told by Ginsberg that there was no more work for him and he should leave immediately. There is no dispute as to the question of whether Gonzalez was discharged on January 18, since Stephan Delmont, operations manager of Respondent, testified that he had observed Gonzalez walking an "illegal" picket line on the afternoon of the 17th, had not returned that day, and therefore Respondent no longer had any job for him. Delmont also stated that during the strike Respondent had installed its own laundry and Gonzalez' job of driving the linen truck was thereby eliminated.

According to Delmont, Gonzalez was reinstated in May 1977 as a houseman. Delmont said the laundry truck job had been eliminated and previously Gonzalez had been in and out of the linen room. Although Delmont characterized Gonzalez' previous job as head houseman, upon his return he was made simply a houseman whose duties were to clean and set up hotel rooms. Delmont acknowledged that Gonzalez had previously worked 6 days as a salaried employee but upon his return in May he was hourly paid as a houseman. Gonza-

[1] It appears that the original charges filed in 245 NLRB 561 included more than 20 hotel members of the Association. However the Union requested withdrawal of charges against all hotels except the four named in the complaint, presumably having arrived at settlements with the others.

[2] At the hearing it appeared that Respondent was urging that Gonzalez was a supervisor within the meaning of the Act and perhaps that is the explanation for its witnesses characterizing him as a "Head Houseman." However, in its brief, Respondent does not urge this contention. Nevertheless it is clear from the record that Gonzalez had no authority to hire, fire, discipline employees, or grant time off or overtime, nor is there any evidence that he effectively recommended such actions. Since he did not exercise the indicia of supervisory authority, I find that Gonzalez was not a supervisor within the meaning of the Act.

lez stated that he reported in May to a new housekeeper, a Mrs. Lima, who sent him to a head houseman and was assigned to work on one of the floors. He said at this time there were about 15 or 20 housemen and he became last in seniority. His name was always on the bottom of the list for work assignments and as a result did not have work upon occasion. In addition he could only obtain a day off after others had chosen. His rate of pay as a houseman in May 1977 was $2.69 an hour.

Gonzalez testified that because of these conditions he had frequently protested to other employees, as a result of which he was called by Delmont to the office who said he had been doing him a favor by giving him a job, and, if Gonzalez had any protest, he should go to the Union. Delmont told him that if his protests continued, he would be discharged.

Delmont also testified with respect to this incident. He stated he had told Gonzalez he was informed that Gonzalez had been telling other workers not to listen to their supervisor and not to do their job properly. Delmont said although Gonzalez denied this, he told him he did not want to hear it anymore and he, Delmont, would not stand for it. Gonzalez was just supposed to do his job and not tell anybody else what to do and what not to do and he was creating trouble. Delmont said Gonzalez was not complaining about his working conditions, as he had testified, but was just telling everybody else what to do and what not to do and not listening to his supervisor, Augusto Feo, the head houseman. Gonzalez was also telling other employees not to listen to Feo.

On the whole, I credit the version as related by Gonzalez. I found Delmont to be less than candid in his testimony generally. For example, while it was quite clear that Gonzalez' duties prior to the strike almost completely related to the linen room, as testified by the then housekeeper Ginsberg, Delmont continually referred to Gonzalez as the head houseman in an apparent effort to characterize Gonzalez as a supervisor, who would therefore not be entitled to the protection of the Act in these circumstances. Finally, upon cross-examination he admitted having seen Gonzalez on occasion in the linen room. With respect to the alleged threats, Delmont acknowledged that he was acting merely upon hearsay as he did not know of any occasion where Gonzalez had told employees not to do their jobs.

Gonzalez worked for Respondent as a houseman until May 1978 when he was terminated.

C. *Discussion and Analysis*

Based upon the testimony and evidence credited just above, I find that Delmont in May 1977 threatened Gonzalez with discharge should he continue to complain to other employees about working conditions. By such conduct, Respondent violated Section 8(a)(1) of the Act.

The principal issue is whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging Gonzalez on January 18, 1977, because he had engaged in picketing for several hours the previous afternoon. There is no question that the facts occurred as alleged. Respondent's contention is that the picketing on January 18 from approximately 1 p.m. until 3:30 p.m. was illegal by virtue of the Association and the Union prior thereto having entered into a new collective-bargaining agreement containing a no-strike clause.

In *Southern Florida Hotel and Motel Association, et al., supra*, the Board found that the new Association contract with the Union was executed on January 17, at 11 a.m. and delivered to the Union. Thus the picketing herein, which began at approximately 1 p.m., took place after the signing of the agreement. However, in that case, in similar circumstances, where picketing occurred between 2 p.m. and 4 p.m., the Board approved the Administrative Law Judge's finding that, despite the occurrence of picketing after the execution of the contract, such conduct "did not provide Respondents with justification for discharging those employees." The Administrative Law Judge determined that in a strike lasting 3 weeks, "A period of time was needed for the air to clear and the dust to settle." He found in that case that some employees who were reporting to work were not permitted to work, others were admitted to work but were told they had no seniority, all adding to a period of confusion. Notwithstanding the fact that Respondent herein was not a specific party to *Southern Florida Hotel*, nevertheless the contract which was executed was the same, the circumstances were the same, and it is noted Gonzalez credibly testified that in conversation with the pickets, he had been told some employees were not permitted to work, conditions had changed, and employees had not been restored to their seniority. It will be recalled that when Gonzalez himself reported, he was told there was only 4 days' work available to him. In view of the similarities of the situation, I am constrained to follow the Board's finding in the *Southern Florida Hotel* case.[3] Accordingly, I find that by discharging Gonzalez on January 18, 1977, because he had engaged in the picketing on the previous afternoon, Respondent violated Section 8(a)(3) and (1) of the Act.

In his testimony, Delmont indicated that by virtue of Respondent having installed its own laundry, Gonzalez had worked principally in the linen room and that the driving of the truck to the outside laundry was only one incident of his duties. As a matter of fact it is uncontradicted that when Gonzalez returned to work on January 17 he spent that day, until the time he resumed picketing, in the linen room to which he was assigned by Ginsberg. Accordingly, I find that his job was not eliminated by Respondent instituting its own laundry facility. In that connection it is noted that this created work for linen room employees who transported the linens from the new hotel laundry room to the linen room.

When Gonzalez returned to work in May 1977 Respondent further violated Section 8(a)(3) of the Act by not reinstating him to a substantially equivalent position. Instead of restoring him to the linen room where he had always worked, Respondent made him a houseman at a lower rate of pay and with little or no seniority. In view of my findings that Gonzalez had been unlawfully discharged on January 18, he was entitled to backpay for the period between that date and his reinstatement in May, and reinstatement.

[3] See 245 NLRB 561, 589.

It is clear that when Gonzalez returned in May, there were other employees working in the linen room. If, as insisted by Respondent's witness, Gonzalez was head houseman, he should then have been reinstated to that position which apparently had been given by that time to Feo, another employee.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Gonzalez was finally terminated in May 1978. Respondent alleges that it took this action because he had refused to obey the orders of his supervisor, Feo, and indeed had threatened his life. Gonzalez, while not denying that he had a dispute with Feo, denies having threatened his life. However, I do not find it necessary to make any findings with respect to this situation. The fact remains that Gonzalez' employment was terminated at that time. The General Counsel has not alleged that on that occasion he was discharged unlawfully nor have I been made aware of any other charge filed in connection with that discharge. Accordingly, I have no alternative but to assume that the termination involved no unlawful conduct on the part of Respondent. Accordingly, I shall not require Respondent to offer reinstatement to Gonzalez.

However, having found that Respondent unlawfully discharged Gonzalez on January 18, 1977, I recommend that Respondent be ordered to make him whole for any loss of earnings and other benefits resulting from that discharge by payment to him of a sum of money equal to the amount he normally would have earned as wages and other benefits from the date of his discharge until the date in May 1977 when he was reinstated, less net earnings during that period. As I have further found that Gonzalez was not reinstated to a substantially equivalent position as that which he had enjoyed prior to January 18, 1977, I further recommend that Respondent be ordered to make him whole for any loss of earnings and benefits resulting from Respondent's failure to do so in May 1977, until his termination in May or June 1978.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee with discharge should he continue to complain about working conditions to other employees, Respondent violated Section 8(a)(1) of the Act.

4. Respondent violated Section 8(3) and (1) of the Act by:

(a) Discharging Flores Demetrio Gonzalez because he engaged in lawful picketing and other activities on behalf of the Union.

(b) By failing to reinstate Gonzalez in May 1977 to a substantially equivalent position, and by further discriminating against him after his reinstatement with regard to his wages, hours, and working conditions, because he had engaged in activities protected under the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

The Respondent, Deauville Hotel, Miami Beach, Flordia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge because they complain among themselves about working conditions.

(b) Discharging or otherwise discriminating against employees because of their union activities including picketing.

(c) Failing to reinstate employees to substantially equivalent positions because of the protected activities in which they were engaged.

(d) Discriminating against employees with regard to their wages or other benefits because of their union and other protected activities in which they had engaged.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Make whole Flores Demetrio Gonzalez for his loss of earnings and any other losses he may have sustained by reason of the various acts of discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

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[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections shall be deemed waived for all purposes.

(c) Post at its Miami Beach, Florida, place of business copies of the attached notice marked "Appendix."[5] Copies of said notice on forms provided by the Regional Director for Region 12, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of the Order, what steps Respondent has taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."